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2009 DEC -2 PM 3: 36

BEFORE THE FEDERAL ELECTION COMMISSION

2009 DEC -2 P 4: 02

SENSITIVE

MUR 5879

DEC 15 2009

EXECUTIVE SESSION

In **CELA** of)
)
)
Harry Mitchell for Congress and)
John Bebbling, in his official)
capacity as treasurer)
)
Democratic Congressional Campaign)
Committee and Jonathan S. Vogel,)
in his official capacity as treasurer¹)

GENERAL COUNSEL'S REPORT # 2

I. ACTION RECOMMENDED

(1) Enter into conciliation with the Democratic Congressional Campaign Committee and Jonathan S. Vogel, in his official capacity as treasurer, prior to a finding of probable cause to believe, to settle violations of 2 U.S.C. §§ 441a(u) and 434(b) resulting from the republication of campaign materials.

(2) Find no reason to believe that the Harry Mitchell for Congress and John Bebbling, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(a) and 434(b).

II. BACKGROUND

This matter arose out of a complaint alleging that the Democratic Congressional Campaign Committee ("DCCC") and Harry Mitchell for Congress ("Mitchell Committee") coordinated a DCCC television advertisement featuring Harry Mitchell that aired on October 31, 2006. The advertisement used video footage of Mitchell that was also used in a separate Mitchell Committee advertisement that aired twenty-four hours later, on November 1, 2006. See First General Counsel's Report ("FOCR") at 3 and Attachment 1. Both advertisements addressed an *Arizona Republic* endorsement of Mitchell. The video footage at issue depicted

¹ At the time of the Commission's reason to believe finding in this matter, Brian L. Wolff was the named treasurer of the Democratic Congressional Campaign Committee. On April 30, 2009, he was replaced by Jonathan S. Vogel.

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1 Mitchell interacting with constituents, included shots of Mitchell directly facing the camera, and
2 comprised approximately fifty percent (50%) of the DCCC's television advertisement. The
3 DCCC reported the advertisement in question as an independent expenditure.

4 In separate responses to the complaint, the DCCC and the Mitchell Committee each
5 submitted sworn affidavits denying that there was any coordination between them. See DCCC
6 Response to Complaint at 4 (denying that its advertisement was coordinated with the Mitchell
7 campaign) and Attached Affidavit of Ann Marie Habershaw at ¶ 6 (stating that she was not aware
8 of any deviation from the DCCC's firewall procedures); Mitchell Committee Response to
9 Complaint at 2 (stating that it was "merely a coincidence – and not coordination") and Attached
10 Affidavit of Kelly C. Ward at ¶ 8 (denying that the campaign communicated with staff from the
11 DCCC's independent expenditure program). Neither response addressed the circumstances
12 leading to the use of identical footage of Mitchell in each advertisement. See FGCR at 4.

13 The Commission found reason to believe that the DCCC violated 2 U.S.C. §§ 441a(a)
14 and 434(b), provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"),
15 based on information indicating that the DCCC made an excessive unreported in-kind
16 contribution to the Mitchell Committee by republishing video footage of Harry Mitchell that was
17 presumably created by the Mitchell campaign. *Id.* at 5-7. The Commission also authorized an
18 investigation to determine the facts surrounding the apparent republication, including how the
19 DCCC obtained the footage of Harry Mitchell utilized in the advertisement. At the same time,
20 the Commission determined that there was not enough information to find reason to believe that
21 any violations resulted from coordination of the advertisement. The Commission took no action
22 at that time with regard to the complainant's allegations of coordination, but indicated that
23 should the investigation into the republication issue uncover evidence of coordination, it would

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1 consider an appropriate recommendation in the future concerning possible violations of the Act
2 resulting from coordination.

3 The evidence obtained during our investigation has confirmed that the video footage of
4 Mitchell contained in the DCCC advertisement was originally produced by the Mitchell
5 Committee for use in its own campaign advertisements and that the DCCC obtained the footage
6 directly from the Mitchell Committee. Therefore, we recommend that the Commission enter into
7 pre-probable cause conciliation with the DCCC to settle violations of the Act arising from its
8 excessive contributions to the Mitchell Committee through the republication of Mitchell
9 campaign materials. In addition, this report sets forth our further analysis on possible
10 coordination between the DCCC and the Mitchell Committee in connection with the production
11 and broadcast of the subject advertisement, concluding that the information obtained during the
12 investigation of the republication issue does not support a coordination finding.

13 **III. RESULTS OF INVESTIGATION**

14 The investigation examined the production of the DCCC advertisement titled "Compare,"
15 including how the DCCC obtained the footage of Mitchell used in the advertisement. DCCC
16 staff member Ellery Gould explained during an interview that the "Compare" ad was developed
17 in response to the *Arizona Republic's* unprecedented endorsement of Mitchell, published on
18 October 27, 2006. Gould worked for the DCCC's Independent Expenditure Unit ("IE Unit") and
19 headed the IE Unit team assigned to the Mitchell/Hayworth race which prepared the DCCC's
20 "Compare" ad. He recalled the urgency of preparing an advertisement to take advantage of the
21 endorsement. Likewise, John Donovan, a partner at the DCCC's media vendor, McMahon
22 Squier and Associates ("McMahon"), who was assigned to work on the Mitchell/Hayworth race
23 recalled the urgency involved in preparing the "Compare" ad because it was only a few days

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1 before the election. Our investigation revealed that the Mitchell Committee provided the DCCC
2 with a copy of the raw video footage used in "Compare" (which we learned was filmed by the
3 Mitchell Committee on September 6 and 8, 2006 at various locations in Arizona for use in its
4 own campaign advertisements) without charge, via the Mitchell Committee's media vendor,
5 Adelstein Liston, on October 27, 2006, the day the *Arizona Republic* endorsement was made
6 public and ten days before the general election.² See Mitchell Committee Subpoena Response, p.
7 1, DCCC Subpoena Response, p. 2; Mitchell Committee Subpoena Response, p. 3. After
8 obtaining the footage, the DCCC then sent the video footage to its media vendor, McMahon
9 Squier and Associates ("McMahon"), who was responsible for producing the advertisement.³
10 The DCCC indicates that the cost of the "Compare" ad was approximately \$427,485.25
11 (\$5,923.43 for the cost of production and \$421,561.82 for the media buy to air the
12 advertisement).

13 DCCC also explained the general procedures that it uses in creating television
14 advertisements. According to the DCCC, the library, maintained by the committee since 2003,

² The Mitchell Committee asserts that it cannot confirm what date the video footage was sent to the DCCC. The Mitchell Committee states that its media vendor sent packages to the DCCC on September 22, 2006 and October 27, 2006 and that one of these two packages contained the footage, but it does not know which one. Mitchell Committee Response at 2. The FedEx package sent to the DCCC on October 27, 2006 was addressed to Kevia Lewis, the Assistant to the DCCC's Chief Operating Officer, who was responsible for collecting candidate footage for the DCCC's media library. See DCCC Subpoena Response, Attachment 3. In contrast, the FedEx package sent on September 22, 2006 was addressed to Christina Reynolds, the DCCC's Research Director. Per the DCCC's internal firewall procedures, Reynolds would have been prohibited from having contact with the Independent Expenditure unit, so the footage used for the advertisement should not have been sent to her. See generally DCCC RTB Response at 2-3. Further, the label on the beta tapes that the DCCC provided to the Commission containing the Mitchell Committee's raw footage have a date stamp of 10/27/2006. Based on this information, it is reasonable to conclude that the footage was sent on October 27, 2006.

³ The discovery indicates that the three tapes were sent to the DCCC and that portions of two of the three were used in "Compare." The first tape was entitled "Firefighters" and was 26 seconds long. Footage from this ad, which primarily showed Mitchell from behind, was not used in "Compare." The second tape, entitled "Outdoors" contained 1 minute and 38 seconds of footage of Mitchell talking to people at a park. The third tape, entitled "Porch," was 46 seconds long and featured footage of Mitchell meeting with senior citizens. Portions of "Outdoor" and "Porch" were used in "Compare."

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1 included video footage, images, and other media from which to draw upon for various uses.⁴
2 See DCCC Subpoena Response, p. 1 and Attachment 3. The DCCC reportedly developed a
3 practice of periodically requesting materials from Democratic members of Congress and
4 Democratic candidates at the start of the election cycle, and of following up with a letter or phone
5 calls if there is no response to the initial request. DCCC Subpoena Response, p. 1 and
6 Attachment 3. According to a 2006 internal DCCC memorandum, the DCCC typically ceased
7 updating the media library after the final primary election was held. *Id.* at Attachment 3. Gould
8 explained that once the decision was made to prepare an advertisement utilizing the endorsement
9 he likely would have filled out a written request for video footage of Mitchell from a library of
10 footage maintained by DCCC, although he did not recall specifically if he followed that
11 procedure in creating the "Compare" advertisement. See also DCCC Subpoena
12 Response, p. 2 (discussing procedures for requesting materials from the media library). The
13 DCCC produced a copy of an "Audio Visual Media Library Request Form" requesting Mitchell
14 footage. DCCC Subpoena Response at Attachment 1. However, the date stamp at the bottom of
15 the form, was 12/18/2006, and the DCCC has been unable to explain why it did not contain a
16 date prior to the "Compare" ad being aired.

⁴ The DCCC explains that the purpose behind its media library is "to have the widest possible array of footage and images available to support the general activities of the DCCC, its candidates and its members." DCCC Subpoena Response, p. 1. An internal memorandum from the DCCC's Chief Operating Officer to DCCC staff, dated May 1, 2006, indicates that footage from the library could be used to help "Democrats prepare public service announcements and other forms of television advertising." *Id.* at Attachment 3. In a sample telephone script provided by the DCCC, a committee staff member following up on a written request for materials was instructed to state that "[t]he committee maintains a B-Roll Archive for a wide range of committee projects and presentations," and that "[t]here is no specific use identified for this material, [sic] the committee does a wide range of projects and presentations and feels it is important to have this material on hand." DCCC Subpoena Response at Attachment 2. One news report indicated that the DCCC's efforts at expanding its media library in 2003 were "in direct response to the BCRA provision banning coordination." Chris Cilliza, *The Message is in the Media*, ROLL CALL, December 25, 2003 (discussing statements made by DCCC Communications Director Kori Bernards).

1 Donovan explained during an interview that when he was first assigned to work on the
2 Mitchell/Hayworth race for the DCCC in the summer of 2006 he sent a request for any video
3 footage available, but he did not know when the video footage in question actually arrived at his
4 office. Donovan stated that he did not communicate with the Mitchell Committee, but rather
5 relied on the DCCC's IE unit for information and footage that he could use to prepare
6 advertisements.

7 The DCCC indicated that it may have issued a general request for video footage from the
8 Mitchell Committee for addition to the DCCC's video library in the ordinary course of business.
9 DCCC Subpoena Response, pp. 1- 3. However, as indicated above, it appears that the video
10 footage used in the advertisements at issue here was not obtained in connection with any such
11 general request. Although the DCCC produced electronic copies of over 200 letters sent to
12 members of Congress requesting video footage and referencing "television advertising" as a
13 possible use for such footage, it was unable to locate copies of any written requests that were sent
14 to the Mitchell Committee.

15 Representatives from the Mitchell Committee could not recall the details of the request
16 that led them to send the footage at issue, other than that the DCCC requested that the Mitchell
17 Committee provide it with a copy of video footage taken of the candidate during the campaign,
18 and indicated that "[n]o purpose for the request was given" by the DCCC. After indicating that
19 they could not recall the details, the response states that it is believed that the request was verbal
20 and that they received the request some time prior to recording the video footage. Mitchell
21 Committee Subpoena Response, p. 3. The Mitchell Committee explains that it placed no
22 restrictions on the use of the footage when it sent copies to the DCCC. *Id.* Notwithstanding the
23 general information obtained regarding the DCCC's video library, the information obtained

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1 during our investigation has revealed that the video footage of Mitchell used in the "Compare" ad
2 was not obtained from the video library pursuant to the policies implemented for obtaining such
3 footage. Rather, it appears it was requested and obtained on October 28, 2006, the day after the
4 *Arizona Republic* announced its endorsement of Mitchell.

5 **IV. ANALYSIS**

6
7 **A. Republication**

8 Under the Act, "the financing by any person of the dissemination, distribution, or
9 republication, in whole or in part, of any broadcast or any written, graphic, or other form of
10 campaign materials prepared by the candidate, his campaign committees, or authorized agents
11 shall be considered an expenditure." 2 U.S.C. § 441a(a)(7)(B)(iii). Further, the republication of
12 campaign materials prepared by a candidate's authorized committee is considered a contribution
13 for purposes of contribution limitations and reporting responsibilities of the person making the
14 expenditure. 11 C.F.R. § 109.23.⁵ In its Explanation and Justification to the republication
15 provision, the Commission explained that the person financing the republication essentially "has
16 provided something of value to the candidate [or] authorized committee." Explanation and
17 Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 442 (Jan. 3, 2003).
18 The Commission has further explained that "Congress has addressed republication of campaign
19 materials through 2 U.S.C. § 441a(a)(7)(B)(iii) in a context where the candidate/author generally
20 views the republication of his or her campaign material, *even in part*, as a benefit" and "can be
21 reasonably construed only as for the purpose of influencing an election." 68 Fed. Reg. at 443;

⁵ Commission regulations set forth a number of uses of campaign materials that do not constitute a contribution to the candidate, none of which are applicable here. See 11 C.F.R. § 109.23(b).

1 Explanation and Justification, *Coordinated Communications*, 71 Fed. Reg. 33190, 33191 (June
2 8, 2006) (Emphasis added).

3 In this matter, there is no question that the DCCC used actual video footage created by
4 the Mitchell campaign. The DCCC and the Mitchell Committee both admit that the video
5 footage at issue was prepared by the Mitchell Committee for use in its own campaign
6 advertisements, that the Mitchell Committee provided the footage directly to the DCCC via its
7 vendor, and that the DCCC used 15 seconds of it in a television advertisement. Further, the
8 Mitchell Committee used 10 seconds of the same clip in its own advertisement that aired
9 simultaneously with "Compare." The footage was a central element of the DCCC's "Compare"
10 ad and was displayed throughout half of the 30 second advertisement. As a result, the DCCC
11 republished the footage created by the Mitchell campaign in "whole or in part" and the
12 "Compare" ad represents a "tangible reproduction" of the Mitchell Committee's campaign
13 materials. *See* 2 U.S.C. § 441a(a)(7)(B)(iii); *see also* MUR 2272 (AMA PAC).

14 Here, the DCCC's republication provided something of value to the Mitchell Committee:
15 additional air time on broadcast television just seven days before the general election. The
16 DCCC indicates that the cost of the "Compare" ad was approximately \$427,485.25 (\$5,923.43
17 for the cost of production and \$421,561.82 for the media buy to air the advertisement), well in
18 excess of the Act's contribution limit of \$5,000 for multicandidate committees. *See* 2 U.S.C. §
19 441a(a)(2)(A). In addition, because of the similarity of the two advertisements and the use of the
20 identical footage, the republication of the Mitchell campaign materials was essentially the
21 equivalent of "buying more time for a candidate's ad." Therefore, as a result of this
22 republication, the DCCC made an excessive in-kind contribution to the Mitchell Committee and

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1 failed to properly disclose the costs of the communication as a contribution in its reports filed
2 with the Commission, in violation of 2 U.S.C. §§ 441a(a) and 434(b).

3 The DCCC argues that the Commission should not pursue the republication violation
4 because the expenditure for the communication was not tantamount to a cash transfer, but rather
5 was the incorporation of parts into an independent communication. DCCC's Response to the
6 Reason to Believe Finding ("DCCC RTB Response"), at 3-5. The DCCC bases its conclusion on
7 language in a 1976 House Conference Report that republication is a contribution because it aids a
8 candidate "in a manner indistinguishable in substance" from a cash payment. But this does not
9 mean that the republishing communication must be "indistinguishable in substance" from the
10 original. Instead, the quoted language is focused on the "indistinguishable" *benefit* to the
11 candidate of the third party's payment for the communication, rather than on the
12 "indistinguishable" *content* of the communication. H.R. Conf. Rep. 94-1057, at 59 (1976), as
13 reprinted in 1976 U.S.C.C.A.N. 946, 974. The DCCC argues that in order to qualify as a
14 republication, the republished communication must consist of "unadulterated republication" and
15 could not include the "incorporation of small parts into a freshly developed message." *Id.* at 4.
16 However, the DCCC's interpretation ignores the plain language of the statute, which
17 encompasses the republication of materials "in whole or in part." See 2 U.S.C. §
18 441a(a)(7)(B)(iii); 11 C.F.R. § 109.23 [emphasis added]. See also 68 Fed. Reg. 443 (stating that
19 "Congress has addressed republication . . . even in part, as a benefit" to a candidate). It is also
20 contrary to the Commission's determinations in prior enforcement matters. See discussion *infra*
21 at 11-12. In considering allegations of republication, the Commission has in the past looked for a
22 "tangible reproduction" of campaign materials as a factor in its analysis; but consistent with the
23 language in the Act, has not required the complete duplication of materials.

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1 In a somewhat related argument, the DCCC tries to distinguish its communication from a
2 republished communication by stating that it "remains an expression of the sponsor's own
3 views." DCCC RTB Response at 3. However, by definition, the actual republication of a
4 candidate's campaign materials in a communication funded by a third party provides a benefit to
5 the candidate as a contribution, regardless of whether the sponsor also shares the same views.
6 See 11 C.F.R. § 109.23. To find that communications that convey the sponsor's own political
7 views would not be subject to the republication provision would undercut the purpose of the
8 republication statute and regulation. Moreover, such an approach could require investigations
9 into a party's subjective intent in preparing the communication. Here, the DCCC's
10 advertisement in question was substantially the same as the Mitchell Committee advertisement
11 that aired 24 hours later. Aside from using the same 15 second clip of footage, both
12 advertisements addressed the *Arizona Republic's* endorsement of Mitchell, both incorporate
13 language from the newspaper endorsement as part of the narration or text of the advertisements,
14 and they were both aimed at promoting the election of Harry Mitchell.

15 The DCCC also argues against a "formalistic test" that would require an "overly
16 expansive interpretation of the republication" provisions and cites to a number of past
17 enforcement matters in support of its argument. DCCC RTB Response at 3-4. We disagree with
18 the DCCC's interpretation of these MURs. The facts of these matters are also distinguishable
19 from the DCCC's republication of Mitchell campaign footage. For example, in its response, the
20 DCCC discusses that in MUR 2272 (American Medical Association PAC) the Commission was
21 equally divided over whether republication occurred because there was no evidence of a tangible
22 reproduction of any materials. However, it appears that the allegation that there were similarities
23 between the American Medical Association PAC's ("AMA PAC") materials and the candidate's

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1 materials was based purely on speculation, and no materials actually distributed by either the
2 AMA PAC or the candidate's campaign were produced for review by the Commission to
3 substantiate the allegation. *See* MUR 2272, Statement of Reasons of Commissioner Thomas J.
4 Josefiah, dated June 26, 1987, at 7-8. As such, in that matter the Commission did not have
5 conclusive information establishing that AMA PAC's materials were republished campaign
6 materials and not materials derived from its own research. *Id.* at 8. Similarly, the DCCC relies
7 on MUR 2766 (Auto Dealers and Drivers for Free Trade PAC), as further support against an
8 expansive interpretation of republication. In that case, the Commission agreed with the Office of
9 General Counsel's recommendation to find no reason to believe because the resemblance
10 between a few sentences in the advertisements at issue did "not rise to a level sufficient to
11 indicate republication . . . because of differences in wording and phrasing." MUR 2766, General
12 Counsel's Report dated September 14, 1989, at 26. In its determination, the Commission
13 considered the PAC's explanation that all of its materials were the result of independent research
14 consisting of news clips, video tapes of debates, legislative records, and other publicly available
15 information. Nevertheless, in its analysis, the Commission still recognized that the republication
16 regulation applies in whole or in part. *Id.*

17 While the DCCC's response correctly states that in past cases the Commission has found
18 that republication occurred in matters where there was evidence of a tangible reproduction, it is
19 important to note that the Commission made these findings even where only portions of a
20 campaign's material were republished. For instance, in MUR 2804R (American Israel Public
21 Affairs Committee), the Commission made probable cause to believe findings where the
22 committee admitted that it copied and distributed candidate position papers and only took no
23 further action because the violation had not been quantified during the investigation. *See* General

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1 Counsel's Report dated March 8, 2000, at 21. More recently, in MUR 5743 (Betty Sutton for
2 Congress), the Commission admonished EMILY's List for the republication of a small number
3 of photographs of the candidate that it downloaded from the candidate's website and
4 incorporated into larger mailers.⁶ See First General Counsel's Report dated November 1, 2006,
5 at 7-8; Certification dated December 5, 2006.

6 The DCCC also argues that "serious practical problems" could result from a Commission
7 conclusion that the DCCC violated the Act by republishing Mitchell campaign footage. The
8 Respondent explains that such an analysis would burden a party's ability to make independent
9 expenditures, would cause independent expenditures to become entirely negative, and may
10 prevent candidate endorsements. DCCC RTB Response at 7-8. Contrary to the DCCC's
11 arguments, the republication provisions do not eliminate the ability to produce independent
12 expenditures, and do not even prohibit the use of republished materials, as long as use of those
13 republished materials does not result in excessive contributions. See 2 U.S.C.
14 § 441a(a)(7)(B)(iii); MUR 2272 (AMA PAC). The DCCC could have avoided violating the Act
15 by obtaining publicly available footage or photos or by using footage of the candidate that was
16 not produced by his federal campaign. See, e.g. AO 2008-10 (VoterVoter.com) (discussing use
17 of independently created footage of candidates). In fact, the DCCC had already broadcast three
18 other ads on behalf of Mitchell through its Independent Expenditure Unit by the time "Compare"

⁶ Further, in Advisory Opinion 2008-10 (VoterVoter.com), the Commission concluded that the use of independently shot footage of a candidate would not constitute the use of campaign materials. However, the opinion indicated that the response would be different if the candidate or authorized committee held ownership or other rights to the footage.

1 was broadcast and, according to vendor John Donovan, those ads used materials that the vendor
2 filmed itself or that the vendor purchased through Getty Images.⁷

3 Unlike other recent republication matters, the video footage used in this matter was not
4 incidental to the communication as a whole. In the past, the Commission has issued
5 admonishments or taken no further action, or taken no action where the value of the republication
6 was likely *de minimis* or where the republished portion was only an incidental part of the
7 communication. See MUR 5743 (Betty Sutton for Congress/ EMILY's List) (Commission
8 admonished a committee where the republished photographs of the candidate were likely of *de*
9 *minimis* value because they comprised only small parts of large printed mailers). See also MUR
10 5996 (Tim Bee) (Commission was unable to agree on whether an independent group's use of a
11 "head shot" photo of a candidate constituted a republication of campaign materials, but because
12 the photo was downloaded at no charge from a candidate's publicly-available website and was a
13 small portion of the television advertisement at issue, the Commission voted to exercise its
14 prosecutorial discretion and dismiss the allegation that the group made an excessive or prohibited
15 contribution to the candidate).

16 The volume and prominence of the campaign material republished by the DCCC sets this
17 matter apart from those previously considered by the Commission. The republished footage in
18 this matter was a central element of the "Compare" ad and was displayed for approximately 15
19 seconds of the 30 second advertisement. The value of a television advertisement in particular is
20 that it consists of expressive visual images displayed on the screen. The cost of airing the
21 "Compare" ad itself also reflects the overall value of communications broadcast through this

⁷ None of these ads used footage of Mitchell, instead they contained "man on the street" interviews and file photos of Mitchell's opponent, J.D. Hayworth.

1 medium. Further, as discussed above, regardless of whether the advertisements conveyed the
2 DCCC's own views, the "Compare" ad still provided a benefit to Mitchell.

3 Accordingly, we recommend that the Commission enter into pre-probable cause
4 conciliation with the DCCC in connection with excessive contribution and reporting inaccuracies
5 that resulted from the DCCC's republication of the Mitchell campaign materials.

6 **B. Coordination**

7 The Mitchell Committee, which prepared the original video footage of the candidate,
8 does not receive or accept an in-kind contribution, and is not required to report an expenditure,
9 unless the dissemination, distribution, or republication of campaign materials is a coordinated
10 communication. 11 C.F.R. § 109.23(a). As discussed in the FGCR, the "Compare" ad met the
11 payment and content prongs of the amended coordinated party communications regulations at 11
12 C.F.R. § 109.37 because the DCCC acknowledged paying for the ad and it was a public
13 communication that referred to a clearly identified federal candidate and was disseminated 90
14 days or fewer before the candidate's election.⁸ FGCR at 8-9. At the reason to believe stage,
15 however, there was no information available relating to the conduct prong. 11 C.F.R. §
16 109.21(d). At the time, the Respondents had not provided an explanation as to how the DCCC
17 obtained the footage of the candidate and how both committees selected the same footage for
18 their advertisements. Because our investigation was limited to the facts surrounding
19 the republication issue, we had limited opportunities to uncover such evidence of coordination.
20 As discussed below, the information gathered appears to demonstrate that communications took

⁸ The D.C. Circuit's recent decision affirming the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications does not impact the analysis in this matter. See *Shays v. F.E.C.*, 528 F.3d 914, (D.C. Cir. 2008).

1 place between the Mitchell Committee and the DCCC in connection with the footage used for the
2 "Compare" ad, but that such communication falls short of meeting the conduct prong of the
3 coordination regulation.

4 Information pertaining to the manner by which the DCCC obtained the Mitchell
5 campaign footage for use in the creation of the "Compare" ad raises questions about whether the
6 conduct prong of the coordination standard is met through the candidate's material involvement
7 in the advertisement.⁹ See 11 C.F.R. § 109.21(d)(1) and (2). A communication meets the
8 "material involvement" conduct standard if a candidate, authorized committee, or political party
9 committee is materially involved in decisions regarding the (1) the content of a communication,
10 (2) the intended audience for the communication, (3) the means or mode of the communication,
11 (4) the specific media outlet used for the communication, (5) the timing or frequency of the
12 communication, or (6) the size or prominence of a printed communication, or duration of a
13 communication by means of broadcast, cable, or satellite. See 11 C.F.R. § 109.21(d)(2). The
14 "material involvement" standard "focuses . . . on the nature of the information conveyed and its
15 importance, degree of necessity, influence or the effect of involvement by the candidate,
16 authorized committee, political party committee, or their agents in any of the communication
17 decisions." 68 Fed. Reg. at 433.

18 The information gathered shows that immediately after the October 27, 2006 *Arizona*
19 *Republic* endorsement, the DCCC staff assigned to the Mitchell/Hayworth race concluded that
20 the endorsement was "unprecedented" and they "urgently" sought to capitalize on it with an

⁹ None of the conduct standards are met if a political committee has established and implemented a firewall that meets the requirements of 11 C.F.R. § 109.21(h). However, the safe harbor does not apply if specific information indicates that, despite the firewall, information about the candidate's or political party committee's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication. 11 C.F.R. § 109.21(h).

1 advertisement. Further, it appears that on the day the endorsement was published, footage date
2 stamped 10/27/2006 was shipped "priority overnight" by Federal Express from the Mitchell
3 Committee's media vendor to the DCCC. The Mitchell Committee footage delivered on October
4 28, 2006 comprised the only footage of Harry Mitchell used in the DCCC's "Compare"
5 advertisement broadcast on October 31, 2006.

6 Based on these circumstances, an argument could be made that the material involvement
7 conduct standard is met because the factual circumstances necessarily led to the Mitchell
8 Committee being materially involved in decisions regarding the means or mode of the
9 communication, the content of a communication, and the timing of the communication. See 11
10 C.F.R. § 109.21(d)(2). Specifically, that the Mitchell Committee had material involvement in the
11 mode of the communication (a television advertisement) because it knew the DCCC sought
12 video footage which presumably would be used in a television advertisement. Additionally,
13 because the footage contained no audio component, it could not be used for some other media,
14 such as a radio advertisement. Further, the Mitchell Committee was necessarily involved in what
15 footage would be used because it provided the specific footage to the DCCC which was less than
16 three minutes in length. In addition, by sending the footage to the DCCC on October, 27, 2006,
17 just ten days prior to the November 7, 2006 election day it was materially involved in the timing
18 of the advertisement, since it was clear that the advertisement would be broadcast approximately
19 within the next ten days, i.e. prior to the election.¹⁹

¹⁹ Further, by obtaining the footage after the date of the primary race, the DCCC deviated from its own firewall practices that would have prevented any interaction between the Mitchell Committee and its IE Unit. *Supra* at 5 (explaining that the DCCC typically ceased updating its media library after primary elections) and footnote 10.

1 There is no evidence of coordination on the content of the communication itself (other
2 than the acquisition of the footage). The discovery indicates that the three tapes were sent to the
3 DCCC and that portions of two of the three were used in "Compare." The first tape was entitled
4 "Firefighters" and was 26 seconds long. Footage from this ad which primarily showed Mitchell
5 from behind and was not used in "Compare." The second tape, entitled "Outdoors" contained 1
6 minute and 38 seconds of footage of Mitchell talking to people at a park. The third tape, entitled
7 "Porch," was 46 seconds long and featured footage of Mitchell meeting with senior citizens.
8 Portions of "Outdoor" and "Porch" were used in "Compare." While the volume of footage
9 provided was certainly not extensive, the DCCC still had multiple choices from which to select.
10 Further, although a portion of the footage chosen by the DCCC for inclusion in "Compare" was
11 the same as that contained in one of the Mitchell Committee's own advertisements, there is no
12 specific information to suggest that the Mitchell Committee was involved in the process by
13 which the DCCC selected that footage for inclusion in "Compare." Finally, while it appears that
14 at the very least the DCCC communicated an administrative request to the Mitchell Committee
15 for footage of the candidate, there is no specific information suggesting that any communications
16 relating to the request were substantive in nature or related to any "decision" regarding the
17 advertisement including content, intended audience, means or mode of the communication,
18 specific media outlet used, timing, frequency, or duration. To the contrary, as discussed earlier,
19 representatives from each of the respondent committees have denied that communication took
20 place between the DCCC's IE Unit and the Mitchell campaign.

21 The same facts that raise the issue of whether the material involvement conduct standard
22 is met also gives rise to a discussion of whether the assent or suggestion conduct standard is met.

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1 11 C.F.R. § 109.21(d)(1) (stating that the communication is created, produced, or distributed at
2 the request or suggestion of a candidate, authorized committee, or political party committee, or at
3 the suggestion of a person paying for the communication, and the candidate, authorized
4 committee, or political party committee assents to the suggestion). The DCCC indicated that the
5 "unprecedented" *Arizona Republic* endorsement of Mitchell just days before the election created
6 an urgent need to produce an advertisement regarding the endorsement immediately. It appears
7 that the DCCC had no footage of the candidate to complete this task, necessitating contact with
8 the Mitchell Committee to request footage that could be used in a television advertisement
9 sometime in the next week. By making such a request the same day as the extraordinary
10 endorsement, and only days before the election, the contact with the Mitchell Committee could
11 be considered tantamount to a suggestion by the DCCC that it produce an advertisement.
12 Further, the Mitchell Committee appears to have immediately sent the footage via its vendor the
13 very same day as the endorsement for arrival the next day, at the same time it was using the exact
14 same footage to create its own advertisement for immediate airing, thereby assenting to the
15 DCCC's suggestion. In short, an argument could be made that the practical effect of the DCCC
16 asking for, and the Mitchell Committee providing, the footage under these circumstances, is that
17 the DCCC made a suggestion that it run an advertisement featuring Mitchell, to which the
18 Mitchell Committee assented by sending the footage. 11 C.F.R. § 109.21(d)(1). However, as the
19 Commission explained in its Explanation and Justification for the coordination regulations, "[a]
20 request or suggestion encompasses the most direct form of coordination, given that the candidate
21 or political party committee communicates desires to another person who effectuates them."
22 Explanation and Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421,
23 432 (Jan. 3, 2003). As discussed above in connection with the material involvement standard,

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1 we have no specific information that establishes that the communication regarding the
2 advertisement was anything more than a generic request for footage. As a result, we do not
3 conclude that the "request or suggestion" conduct standard is met here.

4 As a result, there does not appear to be information to establish coordination between the
5 DCCC and the Mitchell Committee in connection with the advertisement. Accordingly, we
6 recommend that the Commission find no reason to believe that the Mitchell Committee violated
7 2 U.S.C. §§ 441a(a) or 434(b).¹¹

8 **V. CONCILIATION AND CIVIL PENALTY**

9 We recommend that the Commission enter into conciliation with the DCCC prior to a
10 finding of probable cause to believe to settle violations resulting from its republication of
11 campaign materials.

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¹¹ Because the Commission has previously found reason to believe that the DCCC violated 2 U.S.C. §§ 441a(a) and 434(b) in connection with the republication, we do not include the DCCC in this recommendation. Nevertheless, the attached Factual and Legal Analysis regarding the coordination issue is addressed to both the Mitchell Committee and the DCCC.

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VI. RECOMMENDATIONS

1. Enter into conciliation with the Democratic Congressional Campaign Committee and Jonathan S. Vogel, in his official capacity as treasurer, prior to a finding of probable cause to believe to settle violations of 2 U.S.C. §§ 441a(a) and 434(b).

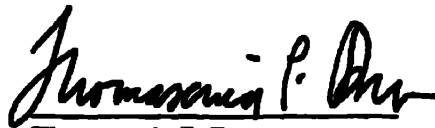
2. Find no reason to believe that the Harry Mitchell for Congress and John Bebbling, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(a) and 434(b).

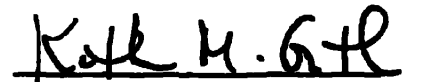
3. Approve the proposed attached conciliation agreement Democratic Congressional Campaign Committee and Jonathan S. Vogel, in his official capacity as treasurer.

4. Approve the attached Factual and Legal Analysis.

5. Approve the appropriate letters.

12/1/2009
Date


Thomasenia P. Duncan
General Counsel


Kathleen M. Guith
Deputy Associate General Counsel
for Enforcement


Peter Blumberg
Assistant General Counsel

Assigned Staff: Ana J. Peña-Wallace
Attorney

Attachment:

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